IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 96

DAVIDSON TRANSFER & STORAGE COMPANY, INC.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It appears at p. 10 *et seq.* of the Record herein. The United States District Court for the District of Columbia, in which court this cause originated, wrote no opinion. Its final order appears at page 8 of the Record herein.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1958. (R. 17). The petition for a writ

of certiorari was filed on June 11, 1958 and was granted on October 13, 1958. (R. 18). The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Does a shipper of property from one State to another by common carrier by motor have a legal right to recover back, by self-help or otherwise, any part of transportation charges paid on the basis of published rates filed with the Interstate Commerce Commission, effective at the time the transportation service was rendered and applicable to it, on the ground that the rates were unreasonable?

2. The Transportation Act of 1940 authorizes the General Accounting Office, upon audit after payment of bills for transportation rendered to the United States by common carriers subject to the Interstate Commerce Act or the Civil Aeronautics Act to deduct the amount of any overpayment to any such carrier from amounts subsequently due such carrier. Does this authority permit the General Accounting Office to make deductions on the ground that in its opinion published rates filed with the Interstate Commerce Commission, effective at the time the transportation service was rendered, and applicable to it were unreasonable?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act (49 Stat. 558, 49 U.S.C. 316(e)(g) and (j), 63 Stat. 280, 49 U.S.C. 304a(5), 41 Stat. 486, 49 U.S.C. 15(7), 54 Stat. 913, 49 U.S.C. 16(3)) and of

the Transportation Act of 1940 (54 Stat. 955, 49 U.S.C. 66) are set forth in Appendix A hereto, *infra*, p. 1a.*

STATEMENT OF THE CASE

Davidson is a common carrier by motor certificated to operate in interstate commerce by the Interstate Commerce Commission. At various times prior to July 20, 1953, it rendered transportation service to the United States, moving property of the United States in interstate commerce to, from, through or between points in the State of New York. Davidson presented bills for its freight charges to the United States and they were paid. The charges were properly computed at the applicable and effective rates filed with the Interstate Commerce Commission in compliance with Section 217(a) of Part II of the Interstate Commerce Act. Included as part of these filed, applicable and effective rates was what was known as the New York State Surcharge. This was a charge over and above the base rates on all movements to, from, through or between points in the State of New York. Its purpose was to recoup the cost to common carriers by motor of a ton-mile truck tax levied by the State of New York for the privilege of operating motor vehicles on the highways of the State, whether in intrastate or interstate commerce.

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* Part I of the Interstate Commerce Act deals with rail carriers. It comprises Sections 1 through 27, which are also Sections 1 through 27 of Title 49 of the U. S. Code. Part II of the Interstate Commerce Act deals with motor carriers. It comprises Sections 201 through 227, which are Sections 301 through 327 of Title 49 of the U. S. Code. References to Part II throughout this Brief will be to the Sections as numbered in that Part and not as numbered in the Code.

On July 20, 1953, after Davidson had rendered the United States the transportation service in question, the Interstate Commerce Commission, exercising its authority under Section 216(g) of Part II of the Interstate Commerce Act, found the Surcharge to be unjust and unreasonable and issued an order requiring Davidson and others to cancel it on or before September 4, 1953. The opinion is reported in 62 M.C.C. 117. The Order is reproduced herein as Appendix B, *infra,* p. 7a. Subsequently, on August 21, 1953, the Commission issued a second order postponing the date for cancellation of the Surcharge to October 15, 1953, on which date it was cancelled. The Order is reproduced herein as Appendix C, *infra,* p. 9a.

Thereafter the General Accounting Office of the United States, on post audit of Davidson's freight bills for the transportation service rendered the United States while the New York State Surcharge was in effect, demanded that Davidson refund to the United States the portion of its freight charges that were based on the surcharge. Davidson made refund under protest and, on February 15, 1955, brought suit for breach of contract to recover back in the United States District Court for the District of Columbia under the Tucker Act, 28 U.S.C. Sec. 1346(a)(2). There being no issue of fact joined by the complaint and answer, cross motions for summary judgment were made and, on June 10, 1957, the District Court entered an order granting Davidson's motion for summary judgment and denying the cross motion of the United States. (R. 8).

On August 7, 1957, the United States filed a notice of appeal to the United States Court of Appeals for

the District of Columbia Circuit. The case was briefed and argued to Associate Judges Prettyman, Bazelon and Bastian. Judge Bazelon thereafter disqualified himself under Section 455 of the Judicial Code, 28 U.S.C. Sec. 455. On April 24, 1958 the Court issued its opinion by Judge Prettyman, Judge Bastian concurring, and entered judgment reversing the order of the District Court and remanding the cause to it "with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective." (R. 17).

SUMMARY OF ARGUMENT

Question 1

The *Montana-Dakota* Case, 341 U.S. 246, held that a buyer of electricity at rates regulated by the Federal Power Commission under the Federal Power Act has no justiciable legal right to any rate other than the rate filed with the Commission and effective at the time the service is rendered. The basis of the holding is that no court can determine whether or not filed rates are unreasonable and the Congress gave the Commission only legislative authority to review existing rates and, if it finds them unreasonable, to prescribe new rates for the future. For a court to retain a suit to recover allegedly unreasonable rates on its docket while it referred the issue of reasonableness to the Commission would be to permit the Commission to do indirectly what the Congress forbids it to do directly.

The *Montana* Case controls here. The authority of the Interstate Commerce Commission over the rates of motor carriers under Part II of the Interstate Commerce Act is, like the authority of the Federal Power Commission under the Federal Power Act, limited to

the fixing of rates for the future. Indeed, the Interstate Commerce Commission does not even have the limited power given the Federal Power Commission to require the refund of amounts collected under newly-changed rates that have been suspended and have then taken effect while proceedings which result in a finding that they are unreasonable are in progress.

The *Montana* Case cannot be distinguished on the theory that it merely held that a complaint for reparations for unreasonable rates stated no claim under the Federal Power Act and therefore no claim cognizable in a federal court absent diversity of citizenship. The basis of the holding in *Montana* is that there can be no recovery, either under the Act or at common law, because neither any court nor the Commission has power to determine the reasonableness of rates charged in the past.

Whatever common law *rights* shippers had before the Interstate Commerce Act were superseded by it. The *Abilene* Case, 204 U.S. 426, approved in *U.S.* v. *I.C.C.*, 337 U.S. 426, makes clear that the Act's preservation of common law *remedies* permits shippers to invoke the aid of courts only to enforce rights which have been conferred by the Act and which can be judicially vindicated without resort to the Commission. Moreover, the Interstate Commerce Act could not have preserved a common law right to a reasonable rate for transportation from one state to another because no such right can exist under the United States Constitution. Common law rights are created only by state law and no state can constitutionally fix rates for such transportation, *Wabash Ry.* v. *Illinois*, 118 U.S. 557. A state cannot do so either prospectively by its legislature or retrospectively by its judiciary.

The declaration in the Interstate Commerce Act that unreasonable rates are unlawful is a statutory criterion for the exercise by the Interstate Commerce Commission of its rate regulatory authority. *Montana, supra.* It does not preserve any justiciable common law rights or create any justiciable statutory rights. The nature and measure of a shipper's rights are found in those sections of the Act which give the Interstate Commerce Commission the power "to reduce the abstract standard of reasonableness to concrete expression in dollars and cents." *Montana,* at p. 251. Under Part II of the Act the Commission's authority so to do is only the legislative authority to prescribe rates for the future. To permit it to prescribe rates for the past would be to permit it to exercise judicial authority that has not been delegated to it.

Part II of the Interstate Commerce Act, enacted in 1935, adopted the rate regulatory methods then and now in vogue. It is based on the assumption that rates which are unreasonable, whether because too high or too low, will be promptly corrected through the exercise of the Commission's authority, upon complaint or *sua sponte,* to grant prospective relief. The result of this regulatory scheme may be, in some cases and for a limited period of time, to permit commerce at rates above or below the "zone of reasonableness." But if this result is to be avoided means of doing so must be devised by the Congress and not improvised by the Courts.

Question 2

The Interstate Commerce Act commands adherence to applicable rates filed with the Interstate Commerce Commission by both shipper and carrier and makes any deviation therefrom a crime. A carrier cannot

refund any portion of charges based on applicable rates unless the Commission, after notice and hearing, finds those rates unreasonable and fixes other rates in lieu of them. On the other hand a carrier may not only voluntarily refund charges in excess of those payable at filed and applicable rates, but can be compelled to do so by a court without resort to the Commission.

Section 321 of the Transportation Act of 1940 requires the United States to pay "full applicable commercial rates" for transportation service rendered it by common carriers subject to the Interstate Commerce Act. Section 322 requires the United States to pay its bills for such transportation upon presentation, but reserves to it the right, on post-audit, to deduct the amount of any overpayment from other amounts due the carrier. The term "overpayment" is the correlative of the term "overcharge." What is an overpayment by the United States is an overcharge by the carrier. It necessarily follows that the General Accounting Office can deduct only for overcharges as defined in the Interstate Commerce Act, namely "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission."

This Court considered in detail Section 322 of the Transportation Act of 1940 in *U.S.* v. *N.Y., N.H. & Hartford R.R.*, 78 S. Ct. adv. 212. Throughout its discussion it used the terms "overcharge" and "overpayment" interchangeably Moreover it made plain that the purpose of the Section was to preserve as against common carriers the substance of the right the United States has always had to require those presenting bills to it to justify the correctness of their charges to the administrative officers of the Government responsible for them.

The Interstate Commerce Act sets forth the standards for determining the reasonableness of rates and confides the function of regulating rates under those standards in the Interstate Commerce Commission exclusively. That Act, together with the Administrative Procedure Act, provides specific procedures for the fixing of rates, all designed to assure full and fair hearings, findings supported by substantial evidence, and the proper exercise of administrative discretion within the standards it lays down. To allow the administrative officers of the Government not only to determine the correctness of charges by carriers, but also to determine the reasonableness of admittedly correct charges would be to vitiate the whole purpose and scheme of rate regulation established by the Congress.

ARGUMENT

A Shipper Has No Right Against Motor Carriers to Reparations for Alleged Unreasonable Rates

The Montana-Dakota Case

The key to the answer to the first question presented is the proper interpretation and the applicability here of the opinion and holding of this Court in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). That was a suit in a United States District Court by Montana, a purchaser of electricity from Northwestern in interstate commerce, grounded on its payment of rates that had been filed with the Federal Power Commission under Section 205(c) of the Federal Power Act. The gravamen of the complaint was an alleged violation of the requirement of Section 205(a) of that Act that rates be just and reasonable. The complaint alleged that Northwestern's rates were unreasonably high, that Northwestern had misled the Commission into accept-

ing the rates by failing to comply with its obligations of disclosure under the Act, that the rates had therefore been improperly established, and that, through interlocking directorates, Northwestern had fraudulently prevented Montana from seeking redress from the Commission while the rates were in effect.

This Court held that the complaint failed to state a cause of action and ordered it dismissed. It held that rate reasonableness is not "a justiciable legal right" but rather "a criterion for administrative application in determining a lawful rate." One "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." 341 U.S. at p. 251. In answer to Montana's argument that the District Court could retain the case on its docket and refer to the Federal Power Commission the issue of the reasonableness of the rates, the Court said:

> "But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent. 341 U.S. at p. 254.

The four dissenting Justices, speaking through Mr. Justice Frankfurter, agreed, in his words, that:

> "Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it

clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a *properly* filed rate or charge has in fact been unreasonably high or low. If that were all the complaint before us showed, we would agree that recovery of damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed." 341 U.S. at p. 258. (Emphasis supplied).

Their dissent was bottomed on the allegation in the complaint that the rates complained of were *not properly filed* with the Commission, i.e., were fraudulently filed. Since there is no claim in this case that any of Davidson's rates were improperly filed, the dissenting opinion is irrelevant on the issue here and the majority opinion must be treated as though it were unanimous.

The Montana-Dakota Case Is Not Distinguishable

Does the *Montana-Dakota* Case control here or is there any basis upon which it can be distinguished? Certainly there is no difference between the provisions of the Federal Power Act and the provisions of Part II of the Interstate Commerce Act from which a distinction can be drawn. Part II of the Interstate Commerce Act was enacted on August 9, 1935, 49 Stat. 543, just 17 days before the Federal Power Act was enacted on August 26, 1935, 49 Stat. 838. Both Acts confer rate regulatory authority on federal commissions by substantively identical provisions couched in substantially the same language.

Both Acts declare unjust and unreasonable rates to be unlawful. Interstate Commerce Act, Section 216(d), Federal Power Act, Section 205 (a). Both give the seller of the service the right initially to estab-

lish rates. Interstate Commerce Act, Section 217(a), Federal Power Act, Section 205(c). Both provide that rates may be changed only by a new filing and thirty days notice. Interstate Commerce Act, Section 217(c), Federal Power Act, Section 205(d). Both provide for hearings concerning the lawfulness of proposed changes and for suspension of such changes for a limited period of time. Interstate Commerce Act, Section 216(g), Federal Power Act, Section 205(e). Both provide for investigation of the reasonableness of existing rates, upon complaint or *sua sponte*, and for the issuance of orders upon such investigation prescribing rates. Interstate Commerce Act, Section 216(e), Federal Power Act, Section 206(a). In both instances this authority is limited to the fixing of rates prospectively. Section 216(e) of the Interstate Commerce Act provides only for the fixing of rates "thereafter to be observed" and for the fixing of practices "thereafter to be made effective.". Section 206(a) of the Federal Power Act provides for the fixing of rates and practices "to be thereafter observed and in force."

In view of the foregoing, it cannot logically or consistently be held that the Interstate Commerce Commission has jurisdiction to determine retrospectively the reasonableness of the properly established legal rates of motor carriers and that the Federal Power Commission has no jurisdiction to determine retrospectively the reasonableness of the properly established legal rates of electric public utilities. In the *Montana* Case the entire Bench agreed that the fact that the Congress withheld from the Federal Power Commission the power to grant reparations constituted a denial of any right to any rate other than the duly established legal rate. So too, the withholding from

the Interstate Commerce Commission of the power to grant reparations to shippers by motor carrier constitutes a denial of any right to any rate other than the duly established legal rate.

This conclusion is fortified by the fact that where Congress intended to give the Federal Power Commission and the Interstate Commerce Commission power to fix rates retroactively it did so in clear terms. It did so in Section 205(e) of the Federal Power Act, in Section 4(e) of the Natural Gas Act and in Section 15(7) of Part I of the Interstate Commerce Act, dealing with rail carriers. All of these sections not only provide for the suspension of rate increases for a limited period of time pending investigation of them, but further provide that the Commission may require that account be kept of all amounts collected under the increases after they are made effective, and, upon completion of the investigation, may require, in the words of Section 15(7), "refund with interest, to the persons on whose behalf such amounts were paid, [of] such portion of such increased rates . . . as by its decision shall be found not justified."

Moreover, Section 13 of Part I of the Interstate Commerce Act authorizes the filing of complaints with the Interstate Commerce Commission for awards of reparations against rail carriers grounded on the maintenance of unreasonable rates in the past. Section 15(1) authorizes the Commission to hear such complaints and to prescribe reasonable rates, and Section 16(1) authorizes it to implement its prescription by issuing orders requiring rail carriers to pay reparations. Section 16(3)(b) requires such complaints to be filed with the Commission within two years from the time the cause of action accrues. Section 16(3)(f)

provides for the enforcement of such orders in state or federal courts by the filing of complaints thereon within one year from the date of their issuance.

There are no similar provisions in Part II of the Interstate Commerce Act dealing with motor carriers. Section 216(g) provides for the suspension of rate increases for seven months pending investigation of them, but, in contrast to Section 205(e) of the Federal Power Act, Section 4(e) of the Natural Gas Act and Section 15(7) of Part I of the Interstate Commerce Act, gives the Commission no authority to require that account of amounts collected under the increases be kept or that refund of any portion of them found unjustified be made. There are no provisions in Part II for the filing of complaints for reparations, or for orders awarding reparations, or for suits to enforce orders prescribing rates.

Where the Congress intended to give the Commission power to deal with the rates of motor carriers retroactively it did so in clear terms. It did so in just one situation. Section 216(f) of Part II of the Act authorizes the Commission, upon complaint of a *carrier* party to a joint rate or upon its own initiative, to fix reasonable divisions of joint rates between the *carriers* party thereto. Where the joint rate has been established pursuant to a finding or order of the Commission, it may require the divisions thereof to be adjusted retroactively to the date of such finding or order. Otherwise it may require adjustment only "from the date of filing the complaint or entry of order of investigation or such other date *subsequent* as the Commission finds justified." (Emphasis supplied). In the face of this the absence of authority to award any reparations to shippers by motor carrier cannot be

laid to Congressional inadvertence. On the contrary such authority was deliberately withheld. Authority so withheld by the Congress cannot be conferred by the Commission or the courts.

The Erroneous Distinction of the Montana Case Drawn by the Court Below and Respondent

The Court of Appeals and Respondent try to distinguish the *Montana* Case on the ground that there the Plaintiff alleged that it had been charged unreasonable rates, while here the Defendant alleges that it was charged unreasonable rates. They point out that this Court held that Plaintiff Montana had no justiciable right under the Federal Power Act to a rate other than the rate filed with the Federal Power Commission, that therefore its claim that the filed rate was unreasonable failed to state a federally cognizable cause of action, and that therefore its complaint had to be dismissed. But, they say, in this case Plaintiff Davidson's claim that the United States breached its contract of carriage did state a federally cognizable cause of action, that therefore its complaint could not be dismissed as was Montana's complaint, and that therefore the District Court was bound to consider the defense that the rates Davidson seeks to recover were unreasonable.

The fallacy in this is that it assumes the answer to the question. Under the Interstate Commerce Act, does a shipper by common carrier by motor have a justiciable legal right to a reasonable rate? We think we have shown that he has not. If not, if, in the words of this Court in the *Montana* Case, the shipper "can claim no rate as a legal right that is other than the filed rate", his claim that the filed rate was unreason-

able is insufficient in law. If it is insufficient in law it makes no difference whether the shipper pleads it as plaintiff or defendant, whether it be pleaded in complaint or in answer. Under the Federal Rules of Civil Procedure a complaint that is insufficient in law must be dismissed, Rule 12, and an answer that is insufficient in law gives the defendant a right to summary judgment. Rule 56.

United States v. *Western Pacific R.*, 352 U.S. 59, upon which Respondent primarily relies, is thus clearly inapposite. In that case the United States pleaded as a defense to a suit by rail carriers for their charges that the rates were inapplicable, because, *inter alia*, they were unreasonable. As we have seen, Part I of the Interstate Commerce Act concededly grants a substantive legal right to a reasonable rate *even though different than the filed rate.* Nevertheless, the Court of Claims overruled the defense on the ground that the two year statute of limitations on complaints to the Interstate Commerce Commission for reparations in Section 16(3) of the Act barred complaints by the United States as well as complaints by private shippers, that the time had run, and that therefore both the Commission and the courts were barred from granting the United States affirmative relief, i.e., reparations. This Court assumed without deciding that affirmative relief would be barred by limitations. However, it held that Section 16(3) did not bar the United States from pleading defenses that were *legally sufficient as a matter of substantive law* to a suit by carriers to recover charges. It further held that it did not bar the referral to the Commission of issues raised in those defenses which the Interstate Commerce Act *gave the Commission jurisdiction to resolve* and which were within its special competence. This holding that

a statute of limitations bars affirmative relief in vindication of concededly existing substantive legal rights, but does not bar defenses based on those same substantive legal rights, cannot support a holding that whether or not there is a substantive legal right depends on whether the one claiming it is plaintiff or defendant.

The basic fallacy in the position of the Court of Appeals and Respondent springs from their failure to grasp the basis of the holding of the *Montana* case. They treat the holding as purely procedural, i.e., as merely delimiting the types of causes of action that a *federal* court can entertain on their merits. The *Montana* Case of course does this. It holds that a complaint alleging that a fraudulently filed rate was unreasonable does not state a cause of action that a federal court can entertain on its merits. But this holding is not grounded on the fact that federal courts are courts of limited jurisdiction. Indeed, the Court took pains to point out that since the complaint alleged the violation of a federal right the District Court had jurisdiction of the cause and that its dismissal for want of jurisdiction was erroneous.

This Court's holding in the *Montana* Case is grounded squarely on the fact that a purchaser of electricity in interstate commerce has no legal right justiciable in any court to any rate other than the rate filed with the Federal Power Commission, whether the filing was fraudulent or not. It follows that the suit would have been dismissed even had there been diversity of citizenship. It also follows that it would have been dismissed had it been brought as a common law action for fraud in a state court.

The foregoing is easily demonstrated. As this Court said in *Montana*, 341 U.S. at p. 252: "Before the [Federal Power] Act [Montana] would have had no statutory right to a reasonable rate, but it did have a common law right not to be defrauded into paying an unreasonable one." 341 U.S. at p. 252. However, it went on, the acts charged by Montana "do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remedial fraud." 341 U.S. at p. 253. But, said this Court, the Federal Power Act gave the Federal Power Commission the exclusive power to fix reasonable rates. At the same time it deliberately withheld from it the power to award reparations or to determine rates retrospectively. The necessary consequence was the abrogation of Montana's common law action. The suggested alternative, reference of the issue of reasonableness to the Commission, was rejected on the ground that it would subvert the statutory scheme by permitting Montana "indirectly to obtain Commission acion which Congress did not allow to be taken directly." 341 U.S. at p. 254.

The dissenting Justices did not quarrel with this holding as applied to "properly" filed rates. They agreed that as to such rates there could be no recovery in damages on the ground that they were unreasonable, under either the Federal Power Act or the common law. "The statute is based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief." 341 U.S. at p. 263.

The Erroneous Theory of the Court Below and Respondent as to the Nature of the Shipper's Right

As we have seen, and as the Court of Appeals here held, Part II of the Interstate Commerce Act, like the Federal Power Act, but in sharp contrast to Part I of the Interstate Commerce Act, confines the rate regulatory authority of the Interstate Commerce Commission to the fixing of rates prospectively. The theory of the Court below was that since Section 216(d) of Part II of the Interstate Commerce Act declares unjust and unreasonable rates to be unlawful and since the Act did not in terms extinguish the common law right to reasonable rates for past services, "the right itself survived" and the common law remedy survived. (R. 15). This cannot be so.

The common law right to damages for the charging of unreasonable rates in the past was a right to the difference between the reasonable rate and the unreasonable rate. Concededly, under the doctrine of *Texas & P. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 527, 27 S. Ct. 350, no court can determine what this difference is. And as the Court below itself said, Part II of the Interstate Commerce Act failed to give the Interstate Commerce Commission authority to do so, that is, it "failed to provide an administrative forum for adjudication of the damages." (R. 15). Instead, it limited the Commission to the fixing of rates prospectively. It follows that both the common law right and the common law remedy were abrogated, and that the only judicially cognizable right remaining is that given by the Act, namely, as *Montana* put it, the right to "the filed rate, whether fixed or merely accepted by the Commission."

The Court of Appeals relied on the fact that Section 216(j) of Part II of the Interstate Commerce Act provides that common law remedies "not inconsistent" with the rate regulatory provisions of Section 216 survive its passage. The answer to this is found in the *Abilene* Case, *supra*, 27 S. Ct. at p. 356. That was a common law suit in a state court by a shipper against a rail carrier alleging that an excessive and therefore unreasonable rate had been charged. The shipper argued that the suit was maintainable because Section 22 of the Interstate Commerce Act provides, *inter alia*, that: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies". The breadth of this savings clause is in sharp contrast with the narrowness of the savings clause in Section 216(j). Nevertheless this Court held that the suit would not lie, saying:

> ". . . we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the 9th section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of." 27 S. Ct. at p. 356.

Dealing specifically with the savings clause, this Court said:

> "This clause, however, cannot in reason be construed as continuing in shippers a common-law

right, the continued existence of which would be absolutely inconsistent with the provisions of the act." 27 S. Ct. at p. 358.

The *Abilene* holding was specifically affirmed, if not enlarged, as recently as 1949. In *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 437, this Court rejected the Commission's argument that a shipper by rail could vindicate his right to reparations specifically granted by Part I of the Act in a federal district court. It did so notwithstanding that Section 9 gives a shipper by rail alternative remedies, either complaint to the Commission under Section 13 or suit in a federal court. The Court held that "it has been established doctrine since this Court's holding in [the *Abilene* Case] that a shipper *cannot file* a Sec. 9 proceeding in a district court where his claim for damages necessarily involves a question of 'reasonableness' calling for the exercise of the Commission's primary jurisdiction." (Emphasis supplied). Since a cause of action to enforce a right to reparations specifically granted by Part I will not lie, *a fortiori* a common law cause of action to enforce a right to reparations deliberately withheld by Part II will not lie.

A Common Law Right Is Unconstitutional

There is another conclusive reason why there can be no common law right against motor carriers for alleged unreasonable past rates on interstate movements. Common law rights exist only by the force of state law. There is no federal common law. Moreover, the federal courts are bound by the state courts in the construction and application of the common law of a state. *Erie R. R.* v. *Tompkins,* 304 U.S. 64. No state

has constitutional power to regulate the rates charged by common carriers for transportation from one state to another. *Wabash Ry.* v. *Illinois*, 118 U.S. 557. It follows that a cause of action for damages for unreasonable rates charged for such transportation would not lie under the common law of any state. A state no more has constitutional power to regulate rates retrospectively through its judiciary than it has to regulate them prospectively through its legislature.

It is no answer to say that the regulation of the rates would as a practical matter be the same as that which the Interstate Commerce Commission would impose had it authority to do so, because its determination of reasonableness would be sought and accepted by the Court. The facts would remain that (1) the creation of the right and the grant of the remedy would be an exercise of unconstitutional power by the state whose common law was invoked, and (2) the court in which suit was brought would enter a judgment based upon a *quasi*-judicial determination by the Commission that it has no authority to make under the power delegated to it by the Congress. Cf. *Montana-Dakota*, *supra*, and *Hope Natural Gas Co.* v. *F.P.C.*, 134 F. 2d 287, 310 (C.A. 4th 1943), holding that the Federal Power Commission, having only *quasi*-legislative power, has no power to award reparations under the Natural Gas Act and therefore "certainly no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions."

Respondent tries to brush this argument off in a footnote to its Brief in opposition to certiorari. (P. 12, fn. 5). It says that the rights of the United States "in its contracts for goods and services are governed

by general common law principles as interpreted by the federal courts, not by the law of any particular state." Assuming this to be true here, the question before this Court is not merely the rights of the United States in its capacity as a shipper by motor carrier, but the rights of private shippers as well.

Respondent also says that "the existence of a state common law remedy for tortious exaction of unreasonable charges for interstate carriage of goods is no more 'regulation' of interstate commerce than is the existence of a state remedy against an interstate motor carrier who tortiously runs down a pedestrian." The analogy is obviously false. The question here is not whether the state can afford a remedy for the invasion of an existing legal right. The question is whether a state can create a legal right, i.e., a right to a particular rate for transportation from one state to another. It has long since been settled that it cannot. Since it cannot it makes no difference that it avoids conflict with federal regulation of rates for such transportation by seeking the guidance of the Interstate Commerce Commission in determining the particular rate it will fix.

The Congressional Declaration That Unreasonable Rates Are Unlawful

Both the Court of Appeals and Respondent rely on the fact that both Section 1(5) of Part I and Section 216(d) of Part II of the Interstate Commerce Act declare that unjust and unreasonable rates are unlawful. This declaration neither preserves any justiciable common law rights nor creates any justiciable statutory rights. Rather, as *Montana* held, it is a "criterion for administrative application in determining a lawful rate." 341 U.S. at p. 251. The *Abilene*

Case makes clear that the Act superseded whatever common law right to reparations a shipper may have had, and substituted therefor rights that it created. "The Act altered the common law by lodging in the Commission the power theretofore exercised by the courts, of determining the reasonableness of a published rate." *Arizona Grocery Co.* v. *Atchison, Topeka & S.F. Ry.*, 284, U.S. 370, 384. Obviously the measure of those rights must be found in those provisions of the Act which give the Interstate Commerce Commission authority to "reduce the abstract concept of reasonableness to concrete expression in dollars and cents." *Montana, supra,* at p. 251.

Under Part I as originally enacted in 1887 this authority over rail rates was judicial only, that is it was limited to determining the reasonableness of rates in the past.

> "Under the act of 1887 the Commission was without power either to prescribe a given rate thereafter to be charged [citations] or to set a maximum rate for the future [citations] *for the reason that to do so would be to exercise a legislative function not delegated to that body by statute.*" *Arizona, supra,* at p. 385. (Emphasis supplied).

Subsequently Part I was amended to give the Commission the power "to speak as the Legislature" in prescribing rates for the future, as well as to speak as a Court by prescribing rates for the past. *Arizona, supra,* at p. 386.

In contrast Part II, enacted in 1935 and reflecting regulatory methods then and now in vogue, conferred *only* legislative authority to fix rates for the future. As *Arizona* would put it, under Part II the Commission is without power to fix rates for the past "for the

reason that to do so would be to exercise a [judicial] function not delegated to that body by statute." It, like the Federal Power Act enacted simultaneously and the Natural Gas Act and the Civil Aeronautics Act enacted in 1938, is "based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief:" Mr. Justice Frankfurter in *Montana*, 341 U.S. at p. 263.

The inevitable effect of the regulatory scheme of these statutes may be in some cases and for a limited period of time to permit commerce at a rate above or below the "zone of reasonableness." Respondent claims that the rates in issue here were above that zone. *Hope Natural Gas Co.* v. *F. P. C.*, 196 F. 2d 803 (C.A. 4th 1952), is one in which the rates in issue were below that zone. There the Federal Power Commission suspended all of a rate increase for natural gas filed by Hope for the maximum period of five months provided by Section 4(e) of the Natural Gas Act, and simultaneously entered into a hearing respecting its lawfulness. At the conclusion of the hearing the Commission found a part of the increase to be justified and disallowed the remainder. Hope then petitioned the Commission to make the increase actually allowed effective retroactively through the period of suspension. The Commission denied the petition and the Court of Appeals affirmed its action.

In its opinion the Court pointed out that the "Commission is given no power to enter reparation orders with respect to rates. Its power over rates, which is prescribed by Section 5(a)[of the Natural Gas Act] is to determine after a hearing whether existing rates are [unlawful] and, if so, to prescribe the just and

reasonable rate 'to be thereafter observed and in force'. If it suspends a proposed new rate under Section 4(e) and enters upon a hearing pursuant to that Section, it can make only such orders with respect thereto 'as would be proper in a proceeding initiated after it had become effective', i.e., a proceeding under section 5(a)." The Court further pointed out that there "is nothing in section 4(e) of the Act which lends support to the contention that upon a determination made thereunder the rates so determined may be given effect through the suspension period. If Congress had so intended it would have been easy enough to have said so." 196 F. 2d at p. 805.

Hope argued that to fail to make the admittedly reasonable increase effective retroactively throughout the period of suspension was to enforce unreasonably low rates against it. The Court gave two answers. First, referring to the fact that "the suspension provision of the [Natural Gas Act] here under interpretation was taken bodily from the Interstate Commerce Act," the Court noted that under the latter Act it had never been the rule "that increased rates allowed after a period of suspension could be made retroactive during that period." Second, it reasoned that with changes in economic conditions rates must be changed from time to time and that "the lag which necessarily accompanies changes may result to the benefit of the utility as well as to its detriment. . . . Rate making is not an exact science and losses of one period must be counterbalanced against gains of another in any fair consideration of the reasonableness of the rate making procedure." 196 F. 2d at p. 808.

It is readily seen that the *Hope* Case and the case at bar present the same fundamental question, which

requires the same fundamental answer. They differ only in this: In *Hope* the seller of service sought to make a rate increase retroactive. Here the buyer of service seeks to make a rate decrease retroactive. The same regulatory scheme that foiled the seller there foil the buyer here. The only regulatory power either the Natural Gas Act or Part II of the Interstate Commerce Act grants is the legislative power to review existing rates and, if they are found unreasonable, to prescribe new rates for the future. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Co.*, 350 U.S. 332, 341. Both Acts withhold the power to award reparations. Section 216(e) of the Interstate Commerce Act, like Section 5(a) of the Natural Gas Act, limits the grant of regulatory authority over effective rates to the prescription after hearing of rates "thereafter to be observed." If the Interstate Commerce Commission suspends a newly filed rate under Section 216(g) and enters upon a hearing pursuant to that Section, its power, like that of the Federal Power Commission acting under Section 4(e) of the Natural Gas Act, is limited to making "such order with reference thereto as would be proper in a proceeding instituted after it had become effective." Just as there is nothing in Section 4(e) to support the contention that rate increases may be made retroactive, so there is nothing in Section 216(g) to support the contention that rate decreases may be made retroactive.

The *Hope* Case emphasized that, under the Natural Gas Act, Hope could properly be deprived of the benefits of a rate increase for a limited period of time during which it was in fact entitled to it. So too, under the Interstate Commerce Act, the shipper can properly be deprived of the benefits of a rate decrease for a

limited period of time during which it was in fact entitled to it. Let us assume that the instant case is one in which the shipper is so deprived, but at the same time let us note one in which the carrier is so deprived. In *Middle Atlantic Conference* v. *A.A.A. Trucking Corporation, et al.*, 302 I.C.C. 499, the Interstate Commerce Commission issued an order on December 2, 1957 finding the rates of certain common carriers below the zone of reasonableness and requiring them to increase their rates on January 10, 1958 to minima found reasonable and prescribed in the order. The record on which the Commission acted was closed on July 24, 1957. It can therefore be inferred that the rates prescribed as reasonable minima for use on and after January 10, 1958 were also reasonable minima for use after July 24, 1957, just as the United States here infers that since the New York Sucharge was unreasonable on the date it was cancelled, it was equally unreasonable during the period it was in effect. Assuming the first inference to be fairly drawn, does it follow that a carrier can recover from shippers the minimum rates so prescribed for transportation service rendered between July 24, 1957 and January 10, 1958? The answer is no. Assuming the second inference to be fairly drawn, does it follow that a shipper can recover the Surcharge paid for transportation service rendered while it was in effect? Again the answer is no. In short, depending on the facts of the case, either the buyer or the seller may suffer from the "regulatory lag." But that result is the necessary consequence of the regulatory scheme the Congress established. If means of avoiding it are desirable they must be devised by the Congress and not improvised by the courts.

The Cases the Court Below and Respondent Rely Upon

All of the judicial decisions actually considering the right of shippers to reparations for unreasonable rates upon which the Court of Appeals and Respondent rely other than the *T.I.M.E.* Case from the Fifth Circuit, which has been consolidated with this case for argument before this Court, deal with the rates of rail carriers. They are therefore plainly inapposite. Nevertheless, since Respondent relies primarily on the *Western Pacific* Case, supra, we pause to analyze it further. Railroads sued the United States in the Court of Claims to recover freight charges made for the transportation of aerial bombs without bursters or fuzes. The United States defended on the grounds that the tariff rate applicable to bombs or mines was not applicable to bombs without bursters or fuzes and that, if it were held applicable, it would be unreasonable. The Court of Claims held the tariff rate for bombs applicable. It further held that the question of the reasonableness of the tariff rate was one that only the Interstate Commerce Commisison could determine, and that its determination was barred by the two year period of limitations provided by Section 16(3) of Part I of the Interstate Commerce Act. It therefore entered summary judgment for Railroads.

This Court, invoking the primary jurisdiction doctrine, reversed the Court of Claims and directed that the case be referred to the Interstate Commerce Commission for a determination of the reasonableness of the tariff rate for bombs or mines as applied to aerial bombs without bursters or fuzes. The Court pointed out that the distinction between "the issues of tariff

construction and of the reasonableness of the tariff as applied" was artificial in that case because "the Government's thesis on the issue of reasonableness is not that the rate on incendiary bombs is, in general too high. It argues only that the rate 'as applied' to these particular shipments is too high. . . . This seems to us to be but another way of saying that the wrong tariff was applied." 352 U.S. at p. 68. Since the resolution of this issue "presupposes an 'acquaintance with many intricate facts of transportation'" reference of it to the Interstate Commerce Commission was required. 352 U.S. at p. 66.

In other words, *Western Pacific* held that the construction of the tariffs in issue there for the purpose of determining the applicability of the rates charged required the determination of issues of fact on the basis of evidence extrinsic of the tariff itself, and that only the Interstate Commerce could make that determination in the first instance. True, the issues of fact went to the reasonableness of the rates. But they did not go to the reasonableness of the rates as an independent matter. They did not go to the reasonableness of admittedly applicable rates. On the contrary, they went to the reasonableness of the rates as a factor to be considered in determining whether they were applicable; whether, in the words of the Supreme Court, "the wrong tariff was applied;" whether, in the language of the Interstate Commerce Act, there had been an "overcharge". In short, the Court applied an ancient and fundamental rule of the common law in the construction of written instruments, viz: That resort to parol evidence must be had to resolve latent ambiguities.

The parol evidence that the Court held was to be used was evidence as to the reasonableness of the result of the construction of the tariff urged by Railroads and adopted by the Court of Claims. It is, of course, commonplace for Courts to compare the reasonableness of the result of one construction of a written instrument with the reasonableness of the result of another in resolving ambiguities. For example, as the Government argued in *Western Pacific*, the question of hazard in transportation is "relevant to the question of tariff interpretation, for, like any other instrument, a tariff is to be read in the light of its known purposes and in a manner which avoids unnecessary and gross unfairness." 352 U.S. at p. 69 fn. 10. The *Western Pacific* Case differs only in that, the reasonableness of rates being a matter the Interstate Commerce Commission has exclusive authority to determine the Court must permit it to make the comparison in the first instance.

This is the only rational interpretation of the holding. Part I of the Interstate Commerce Act gives shippers two distinct rights against rail carriers, a right to damages for the exaction of unreasonable rates in the past, Sec. 16(3)(b), and a right to recover "overcharges". Sec. 16(3)(c). The latter are defined to mean "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." Sec. 16(3)(g). It is inconceivable that this Court was ignorant of or presumed to abolish this Congressionally created distinction between damages for the exaction of unreasonable rates and recovery of overcharges, especially since it approved and relied upon *Great Northern Ry.*

v. *Merchants' Elevator Co.*, 259 U.S. 285, in which the distinction is recognized and discussed.

The opinion in the *Western Pacific* Case did not dwell on or spell out the distinction between unreasonable and inapplicable rates. This is entirely understandable since the distinction had no practical significance in that case. The suit being one by a rail carrier, the claim that the rate charged was unreasonable was available to the United States whether its defense was that the rate was applicable but unreasonable, or that the rate was inapplicable because its application would produce an unreasonable result. In fact the United States made both defenses. Consequently, assuming *arguendo* that this Court directed the referral of the issue of the reasonableness of applicable rates to the Commission, it acted properly.

Where, however, as here, we are dealing with the rates of motor carriers, the distinction is of vital importance because, as we have shown, a shipper by motor carrier, in contrast to a shipper by rail, has no justiciable legal right to any rate other than the filed rate and thus has no right to recover damages for the exaction of unreasonable rates in the past. It can challenge reasonableness, if at all, only in support of a claim that the rates it paid were inapplicable because they produced an unreasonable result. Respondent makes no claim that Petitioner's rates in issue here were inapplicable. Indeed, it could not make such a claim. Their applicability to the transportation rendered it is perfectly plain. There is no ambiguity to resolve, latent or patent. There is therefore no basis in law or fact for considering parol evidence, viz: evidence that the application of the rates did produce an unreasonable result.

In sum, the distinction between the *Western Pacific* Case and the case at bar is that a shipper by rail is given by the Interstate Commerce Act a justiciable legal right to reparations for unreasonable rates exacted in the past, which right is enforceable in either Commission or Court. But a shipper by motor carrier has no such right. Its only right respecting filed rates charged in the past is to recover overcharges, i.e., charges in excess of those payable under the applicable tariffs. Sec. 204a(5) If Respondent in this case had answered Petitioner's complaint by denying that the Surcharge was applicable to the transportation service rendered it would have pleaded a defense sufficient in law. The District Court could have either itself construed Davidson's tariffs and determined whether the Surcharge was applicable or, if the construction posed questions within the special competence of the Interstate Commerce Commission, referred the question to it. But the answer having admitted that the Surcharge was applicable, the District Court had no alternative but to give judgment for Petitioner. To hold that the *Western Pacific* Case gives the Interstate Commerce Commission jurisdiction to determine retroactively the reasonableness of the past rates of a motor carrier would be wholly improper. It would be to interpret that case, which prescribed in the light of its own facts the method of adjudicating the merits of legally sufficient defenses to a suit by a rail carrier, as creating justiciable legal rights against a motor carrier that the Congress specifically withheld.

As for the consistent decisions of the Commission upon which the Court below and Respondent rely, their only consistency is in the error of their result. Suffice

it to quote this Court's statement in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678, fn. 5, holding erroneous in 1954 an interpretation of the Natural Gas Act that the Federal Power Commission had followed since 1938: "[C]onsistent error is still error."

The General Accounting Office Has No Authority to Deduct From Amounts Due Carriers on the Ground That in Its Opinion Filed and Applicable Rates Are Unreasonable

Basis for Considering the Question

If a shipper has no legal right against a common carrier by motor to any rate other than the filed rate, obviously the General Accounting Office has no authority to deduct charges paid on the basis of a filed and applicable rate from amounts otherwise due common carriers on the ground that the filed rate was unreasonable. In other words, if the first question presented be answered no, the second question will be moot. Therefore, we assume *arguendo* in the discussion that follows that the first question is answered yes.

The Action of the Court Was Error Under the Interstate Commerce Act

The Court of Appeals held that it was not clear from the findings of the Interstate Commerce Commission in *Surcharges—New York State*, 62 M.C.C. 117, whether it "meant to find the surcharge an unreasonable rate during the then-past period when it was in effect." (R. 16) Consequently, although it reversed the judgment for Petitioner for its charges, it did not enter judgment for Respondent. Rather, it remanded the cause to the District Court "with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff sur-

charge as a rate during the period when it was filed and effective. Upon receipt of that finding the District Court will proceed to the adjudication of the action before it." (R. 17).

We submit that this action was erroneous. Until the Interstate Commerce Commission finds a rate unreasonable and prescribes another in lieu thereof, a carrier rendering transportation service to which the rate is applicable is entitled, indeed is bound in law, to collect and retain charges based on it. The General Accounting Office therefore unlawfully deducted the surcharge from amounts otherwise due Petitioner and Petitioner is entitled to the judgment the District Court gave it.*

The whole statutory scheme of rate regulation of common carriers under both Part I and Part II of the Interstate Commerce Act makes a distinction between overcharges and charges based upon allegedly unreasonable rates. Thus, Section 217(a) of the Interstate Commerce Act requires the filing of tariffs. Section 217(b) forbids carriers to "charge or demand or collect or receive a greater or less or different compensation" than that specified in the filed tariffs. Section 222(c) subjects to criminal penalties "Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof" who shall "assist, suffer or permit any person . . . natural

*There were actually no deductions in this case. Following its custom, the General Accounting Office made demand on Petitioner for refund of the alleged overpayments, stating that if it were not made within 60 days deductions against other bills would be made. Because deductions complicate its accounting procedures Petitioner, as do many carriers, made refund under protest. This has been uniformly treated by the General Accounting Office, the carriers and the courts as the equivalent in law of deduction.

or artificial, to obtain transportation of . . . property for less than the applicable rate . . .".

The Interstate Commerce Commission has exclusive authority to determine that applicable rates are in fact unreasonable, and shippers are bound to pay applicable rates, whether or not they think them unreasonable, until the Commission, acting after notice and hearing under the Act, (Section 15(1) rail or Section 216(e) motor) finds that such rates are unreasonable and prescribes reasonable rates in lieu of them. *T. & P. Ry.* v. *Abilene Cotton Oil Company*, 204 U.S. 426 (1907); *Arizona Grocery Company* v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370 (1932); *Loveless Mfg. Co.* v. *Roadway Express*, 104 F. Supp. 809 (D.C. Okla. 1952); *Pyramid Nat. Van Lines* v. *Goetze*, 65 A. 2d 595 (Mun. App. D.C. 1949).

On the other hand, overcharges as defined in the Interstate Commerce Act may be recovered in Court without reference to the Commission. See *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285; *U. S.* v. *Western Pac. R. Co., supra*, 352 U.S. at p. 69. They may be voluntarily refunded by the carrier. As early as 1910 the Commission held that there "should be no necessity for appealing to governmental authority to award damages for plain overcharges. It is the plain duty of the carriers to collect no more than the published rate; to do otherwise is a crime for which indictment will lie and for which there is serious punishment provided in law against both the carrier and its agent." *National Refrigerator and Butcher Supply Co.* v. *Illinois Central R.R. Co.*, 20 I.C.C. 64, 65.

In short, a common carrier, in accord with his obligations under the Interstate Commerce Act to abide

his tariffs, is under a duty to refund overcharges upon demand. But, by the same token, he is under a duty to collect and a shipper under a duty to pay charges based on legal, applicable rates, whether or not those tariffs are, or are thought to be, unreasonable, and even though rates other than applicable rates have been charged over a long period of time. *Aetna Plywood & Veneer Co.* v. *Indianapolis Forwarding Co.*, 52 M.C.C. 591, 594 (1952). To do otherwise is to violate the Interstate Commerce Act. On more than one occasion a carrier has been "admonished that its duty as a common carrier under the Interstate Commerce Act is to make certain that the applicable fares are collected." *Alexandria, Barcroft & Washington Fares Between the District of Columbia & Virginia*, 48 M.C.C. 613, 626 (1948).

The Transportation Act of 1940 Gives No Authority to Deduct for Unreasonableness

The body of fundamental law just set forth in applicable whether the transportation service is rendered to the United States or to a private person. Section 321 of the Transportation Act of 1940 requires the United States to pay "the full applicable commercial rates" for the transportation service rendered it by a common carrier subject to the Interstate Commerce Act unless special contracts are entered into pursuant to Section 22 of that Act, which was not done here. Section 322 requires the United States to pay for transportation service by common carriers "upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office", but reserves the right in the United States "to deduct the amount of any *overpayment* to

any such carrier from any amount subsequently found to be due such carrier." (Emphasis supplied).

This Court, in *U. S.* v. *N. Y., N. H. & Hartford R. R.*, 78 S. Ct. adv. 212, considered in detail the history of Section 322 of the Transportation Act of 1940. Prior to its adoption the United States "protected itself against transportation overcharges by not paying transportation bills until the responsible government officers, and, in doubtful cases, the General Accounting Office, first audited the bills and found that the charges were correct." 78 S. Ct. at p. 214.

> "[T]he Congress was desirous of aiding the [carriers] to secure prompt payment of their charges, but it is also clear that the Congress, and the [carriers], contemplated that the Government's protection against *overcharges* available under the preaudit practice should not be diminished. The burden of the carriers to establish the correctness of their charges was to continue unabridged. The carriers were to be paid immediately upon submission of their bills but the carriers were in return promptly to refund *overcharges* when such charges were administratively determined. The carrier would then have 'to re-collect' the sum refunded by justifying its bills to the agency or by proving its claim in the courts." 78 S. Ct. at p. 216. (Emphasis supplied).

To assure compliance by carriers with their obligation to refund overcharges "administratively determined," Section 322 conferred on the "United States Government" authority "to deduct the amount of any overpayment" from other amounts due them. Obviously the key to the reach of this authority is the meaning of the word "overpayment". We submit that what is an overpayment by a shipper is necessarily

an overcharge by a carrier. The two are correlative terms. Therefore, that which is not an overcharge is not an overpayment. Section 204a(5) of the Interstate Commerce Act specifically defines overcharges by a motor carrier "to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." This is the identical definition of overcharges by a rail carrier made in Section 16(3)(g) of the Act. Thus, Section 322 of the Transportation Act of 1940, read as it must be with Sections 16(3)(g) and 204a(5) of the Interstate Commerce Act, defines an overpayment to exclude a payment of charges properly and accurately computed on applicable rates.

The Congress reiterated and made explicit this definition of the word "overpayment" at its last Session. Public Law 85-762, 85th Cong., S. 377, approved and effective August 26, 1958. This Law amends the Interstate Commerce Act, *inter alia*, to impose a statute of limitations of three years for the institution of proceedings by the United States to recover freight charges from any common carrier subject to the Act. It also amends Section 322 of the Transportation Act of 1940 to require that deductions of overpayments by the General Accounting Office be made within three years except in time of war, and to require that claims to the General Accounting Office by carriers be filed within three years except in time of war. To make crystal clear that the General Accounting Office cannot make deductions to recover charges based on allegedly unreasonable applicable rates the words "overcharge by" are substituted for the words "overpayment to" in Section 322 so that it now authorizes "the United States Government to deduct the amount of any over-

charge," defined in the Section to mean, insofar as relevant here, "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission." Thus the Congress has confirmed and put within the four corners of Section 322 of the Transportation Act of 1940 its command that the General Accounting Office deduct only charges in excess of those payable on applicable rates.*

In the light of the foregoing, we submit that Section 322 of the Transportation Act of 1940 does not authorize deduction on the ground that the General Account-

* Section 322 now reads in its entirety as follows:

"Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overcharge by any such carrier from any amount subsequently found to be due such carrier. The term 'overcharges' shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission and the Civil Aeronautics Board and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of the Interstate Commerce Act:

Provided, however, That such deductions shall be made within three years (not including any time of war) from the time of payment of bills: *Provided further,* That every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Accounting Office within three years (not including any time of war) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later."

ing Office thinks applicable rates unreasonable. That this Court so interprets Section 322 is implicit in the opinion in the *New Haven* case. The Court uses the terms "overcharge" and "overpayment" interchangeably. It refers to the duty of carriers "promptly to refund overcharges" that have been "administratively determined", referring to the determinations made by "the responsible government officers" or the General Accounting Office. Again, it speaks of the carriers' burden of proving the "correctness of their charges", either to "the agency" or "in the courts".

All of this is absolutely inconsistent with a right in the Government to recoup charges properly and accurately computed on applicable rates unless the Interstate Commerce Commission has first (1) found those rates unreasonable and (2) prescribed reasonable rates in lieu of them. As was said in *Montana-Dakota*, 341 U.S. at p. 251:

> "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high . . . To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission."

Thus, neither the "responsible government officers" nor the General Accounting Office can "administratively determine" rate reasonableness. Nor can the courts determine it. Therefore, the reasonableness of the carriers' rates cannot be part of their burden of proving "the correctness of their charges".

Respondent does not claim here that Petitioner's charges were not correct, i.e., not properly and accu-

rately computed on filed and applicable rates. In these circumstances the General Accounting Office had no authority to deduct them from other amounts due Petitioner*. That Office having unlawfully deducted them, Petitioner had a right "to re-collect" them in court. This was the right the judgment of the District Court vindicated. The Court of Appeals, in reversing that judgment, in effect interprets Section 322 as repealing the Interstate Commerce Act *pro tanto* by giving the General Accounting Office the prerogative of "administratively determining" rate reasonableness. This is a prerogative that not even the Interstate Commerce Commission has. It can determine rate reasonableness only in accord with the specific procedures prescribed by the Congress in the Interstate Commerce Act and the Administrative Procedure Act to assure a full and fair hearing and findings supported by substantial evidence.

Finally, the effect of reversing Petitioner's judgment for its charges is to vitiate Section 321 of the Transportation Act of 1940, i.e., to relieve Respondent tost its obligation under that Section to pay "the full applicable commercial rates, fares, or charges" for transportation service rendered it by common carriers subject to the Interstate Commerce Act. Under the holding of the Court of Appeals the General Accounting Office can "administratively determine" that applicable rates are unreasonable and force refund of charges based on them. The carrier must then either bring suit or give up. If he brings suit he must not only prosecute his claim in court but in a proceeding

* This distinguishes the deductions here from those in the *Western Pacific* Case. As we've shown, *supra*, p. . . ., the Government there claimed that the charges deducted were computed on inapplicable rates.

before the Interstate Commerce Commission, where, under the rule of the *New Haven* Case, he presumably has the burden of proving that rates filed with and accepted by the Interstate Commerce Commission are reasonable—a burden that is not his under the Interstate Commerce Act. Faced with this prospect, and since deductions based on charges by any particular carrier computed on any particular rate are ordinarily small, e.g., $18.34 in this case, the carrier usually has to give up. The practical result is that, as far as transportation for the United States is concerned, the General Accounting Office has assumed the rate regulatory function of the Interstate Commerce Commission.

CONCLUSION

For the reasons set forth in this Brief, Davidson Transfer & Storage Co., Inc., prays that the judgment of the Court of Appeals be reversed and the cause remanded to it with directions to re-instate the judgment of the United States District Court for the District of Columbia.

Respectfully submitted,

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